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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 673

CORTLANDT R. TURNEY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinion Below

The opinion below, constituting the findings of fact and conclusions of law of the District Court (P. 62a-71a) were dated March 14, 1951, and are unreported. The judgment of the Court of Appeals for the Third Circuit affirming without opinion the judgment of the District Court is reported at 192 F. 2nd 1023.

Statute Involved

The appropriate and pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 855, 50 USC App. 308, are correctly set forth in the Appendix (P. 17) of the Petition for Writ of Certiorari.

Statement of the Case

Petitioner, a railroad security analyst employed by the respondent in 1933, left respondent's employ for a brief period in 1941 and again for the period between January 1942 and January 1946 to serve in the armed forces.

He returned to the respondent's employ in September of 1946, received at that time a salary increase of $1,100 per year and was restored to his position in full compliance with the requirements of the appropriate provisions of the Selective Service Act.

Four years later petitioner instituted suit in the District Court claiming that the respondent promoted its employees on the basis of a system of seniority and asserting that because he had served longer than two other employees who had risen to executive positions in the Company, he had thereby become entitled to the office of Vice-President.

The District Court summarized its findings of fact as follows:

> "In short the issue here revolves itself into one as to whether the petitioner has carried the burden of establishing that this Company had a custom and practice whereby the employees, such as petitioner, would advance by reason of their seniority from position to position. I find no such proof offered or present in the petitioner's case. There is some showing that the persons who were employed longer than other persons were advanced, that is particularly in the case of Mr. Sedgwick and Mr. Randell, but there is little evidence to show any departure from any custom and practice in the treatment of the petitioner because there is no showing that there was originally any custom and practice. The people in this small department were advanced by reason of their recommendation to the higher officials, and then to the Board of Directors on

what were regarded as factors for promotion, sometimes including seniority." (P. 69a-70a)

ARGUMENT

1. The Decision Below Turns on Its Own Facts and Does Not Involve Any Question of Law Which Would Call for the Issuance of a Writ of Certiorari.

The decision below is not based upon any interpretation of the Selective Service Act at variance with the decisions in the other circuits or with the decisions of this Court. The concept of the moving escalator referred to in *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 90 L. Ed. 1230 (S. Ct. 1945), as well as the principle that a seniority status secured by the statute continues beyond the first year of reemployment (*Oakley* v. *Louisville & Nashville Railroad Co.*, 338 U.S. 278, 94 L. Ed. 87 (S. Ct. 1949)) are entirely consistent with the result reached by the District Court and unanimously concurred in by the Court of Appeals.

But in order for there to have been a seniority status within the meaning of the *Oakley* case, there would have had to be a contract (or custom or practice) establishing such seniority, as was made clear in footnote 21 of the opinion of this Court in *Trailmobile* v. *Whirls*, 331 U.S. 40, 91 L. Ed. 1328 (S. Ct. 1946). See also *Aeronautical Industrial District Lodge 727* v. *James L. Campbell*, 337 U.S. 521, 526, 93 L. Ed. 1513, 1518 (S. Ct. 1948).

The case was tried below on the theory that petitioner would establish facts showing that the respondent by its custom or practice applied a system of seniority by which persons would be appointed or elected to executive positions in the respondent company. Petitioner's counsel very early in the trial acknowledged to the Court that he would attempt to prove such a custom and practice. (R. 1a-2a)

With the failure of the petitioner to establish such facts,

with the finding of the District Court in favor of the respondent confirming such failure of proof (P. 69a-70a), and with the unanimous per curiam opinion of the Court of Appeals holding that "The questions presented by the appeal at bar are completely factual and need not be elaborated upon here", there was more than ample support for the application of Rule 52 of the Rules of Civil Procedure (28 USC, Rule 52) that findings of fact should not be disturbed on appeal unless clearly wrong, unsupported by the evidence.

2. The Petition Sets Forth, as Facts, Material Which Is Contrary to the Evidence as Well as Material Which Is Not in the Record.

Although petitioner was represented in the trial of the action below, his appeal and this petition are being prosecuted pro se. We recognize that a degree of liberality must of necessity be exercised in forgiving transgressions of this character committed by a litigant who does not have the assistance of counsel. We should have preferred to have avoided entirely any reference to the misstatements and exaggerations which the petition purports to present as facts were they not so gross in character and were they not so cumulative in their apparent effect.

In an effort to assist the Court in the determination of the fundamental issue we here summarize the major misstatements contained in the petition:

(a) Petitioner asserts and repeats that respondent or respondent's witnesses "admitted" that promotions in the department were made by seniority. But in fact, all of defendant's witnesses testified that other factors influenced promotions (R. 60a, R. 67a, R. 79a), one or two of them indicating that seniority might be considered when all other factors were equal. (R. 67a, R. 46a)

(b) The disparagement of the ability of Mr. Sedgewick and of Mr. Bayles, petitioner's superiors in the investment department, set forth on page 5 of the petition, are unsupported by the record.

(c) The charge, made on page 7 of the petition, that respondent attempted to intimidate the petitioner, is completely without factual foundation in the record. To the contrary, the record contains numerous instances of the respondent's generosity, kindness and consideration for the petitioner, particularly during the last four years of his employment with the Company. It shows that he received successive increments which raised his annual salary from $3,900 to $6,240 during that period (R. 4a), and it shows that he was held in high regard by the President of the Company for his ability as a railroad analyst. (R. 58a, R. 48a)

(d) The assertion on page 13 of the petition that "The Court made no finding of fact as to whether petitioner would have been promoted if he had remained continuously at work" is wrong. The Court did find in fact that he received "the normal increments that would have come to him had he been in the employ of the Company instead of the armed forces." (P. 66a) It also found that "he received other treatment such as was accorded the men who left the Company to go into the armed forces and indeed there is no dispute as to that." (P. 66a)

(e) Reference on page 14 of the petition to the decision in the case of *Anderson* v. *Schouweiler*, 63 F. Supp. 802 (D.C. Idaho, 1945) is not in point, for in that case, unlike the petitioner's, the employer had failed to meet his obligations under the Selective Service Act. In this case it has been found by two Courts that the employer did fully meet his obligations. As the District Court said in its findings of fact, what the petitioner sought here was not restoration, but "installation in the position of Vice-President of the respondent company." (P. 69a)

3. There Is No Conflict of Decisions Between the Decision of the Court of Appeals and the Decision of Any Other Court of Appeals, or of the Supreme Court.

The holding below is consistent with the ruling decisions. The point of conflict which the petitioner seeks to create can be reached only if we ignore the facts. Petitioner's challenge of the decision of the District Court as affirmed by the Court of Appeals, is based on the necessary presupposition that his employer had a fixed system of seniority. That is contrary to the record and contrary to the findings.

The only conflict which exists in this case is a conflict between the petitioner's version of the facts and the facts of the record as found by the Courts below.

Conclusion

The prayer of the petition should be denied because it is clear from the record and from the decisions of the District Court and the Court of Appeals that there is no question of law applicable to the facts of this case which has not been decided in accordance with the decisions of this Court and with the decisions of the other Courts of Appeal, and also because it appears from the record and from the opinion below that the issues were entirely factual and were decided in favor of the respondent on the basis of ample support in the record.

Respectfully submitted,

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